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NO 80-1897

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

JOSEPH M. KADANS,)
Petitioner)
VS.)
LEO J. O'BRIEN,)
Respondent.)
)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITIONER
IN PRO SE

THE QUESTION PRESENTED

1. Whether a fact-gathering hearing conducted by a non-decision-making agency relating to the appointment of personnel with the facts to be transmitted to appointing authority may be regarded as a judicial or even quasi-judicial proceeding as to provide an absolute privilege to witnesses appearing before the agency.

THE PARTIES

The parties to this proceeding are as listed in the caption of the case.

TABLE OF CONTENTS

	PAGE
Opinions below	1
Jurisdiction to review	2
Question presented.....	2
Statement of the Case	2
Basis for federal jurisdiction in the court of first instance.....	2
Proceedings below.....	3
Importance of issue.....	3
Nature of the hearing.....	4
The point of law.....	5
Summary of argument.....	5
Argument	7
The hearing in the case at bar was in no sense a judicial or quasi-judicial proceeding.....	7
The matter of existence of malice is a question for the jury.....	11
Any testimony with regard to any future employment or appointment of an individual must not be irrelevant or unconnected with the matter at issue.....	13
Conclusion.....	14
Appendix - Memorandum Opinion.....	A1
Appendix - Denial of rehearing.....	A2

TABLE OF AUTHORITIES

PAGE

Cole v. Neaf, 334 F 2d 326 (1964)..... 11
Foltz v. Moore McCormack Lines,
189 F. 2d 537, 65 Harv.L.Rev.239... 10
Ktsanes v. Underwood, 560 F 2d 790
(7th Cir. 1977)..... 9
McAfee v. Feller, 452 S.W. 2d 56
(Texas, 1970) 9
National Surety Company v. Page, 58
F 2d 326 (1964) 11
People ex rel Karlin v. Culkin, 348 NY
465, 162 NE 487, 60 ALR 851..... 7
Richards v. Konklin, 94 Nev. 86, 575
P.2d 589 (1978) 5
Romero v. Prince, 85 N.M. 474, 513 P 2d
717, 719 (1973) 6
Stewart v. Sonneborn, 98 U.S. 187,193
(1878) 12
Summers, Re, 325 U.S. 561 (1945)..... 8

Federal Statutes
28 U.S.C. 1254(1) 2
28 U.S.C. 1332 3

Textbooks
Prosser, Law of Torts, 4th Ed. 7,12,13,14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO._____

JOSEPH M. KADANS, Petitioner

v.

LEO J. O'BRIEN, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner prays that a writ of certiorari be issued to review a final order, entered on January 29, 1981 denying a petition for rehearing.

OPINION BELOW

The opinion of the United States Court of Appeals has not yet been reported. A copy of this opinion and of the order denying rehearing is in the appendix attached hereto.

The District Court granted a motion to dismiss the action on February 28, 1978, without any opinion.

JURISDICTION TO REVIEW

This petition for review is filed pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a fact-gathering hearing conducted by a non-decision-making agency relating to the appointment of personnel with the facts to be transmitted to appointing authority may be regarded as a judicial or even quasi-judicial proceeding as to provide an absolute privilege to witnesses appearing before the agency.

STATEMENT OF THE CASE

a. Basis for federal jurisdiction in the court of first instance. This is a suit seeking damages of $1 million from the defendant for slander, filed in the United States District Court for the District of Nevada on November 22, 1977 in a diversity of citizenship case filed

by virtue of Title 28 U.S.C. 1332, jurisdiction existing because of diversity of citizenship and the amount in controversy being sufficient.

b. Proceedings below. After filing of the complaint for slander, with jury trial demanded, the defendant filed a motion to dismiss on January 31, 1978 upon the ground that the testimony given by the witness, the Defendant Leo J. O'Brien (now the Appellee) had an absolute privilege. The United States District Court granted the said motion on February 28, 1978, without any opinion. An appeal was filed with the Ninth Circuit, United States Court of Appeals, where the action of the District Court was affirmed, without oral argument being allowed, although requested. A motion for rehearing was denied. Notice of appeal to the United States Supreme Court has been filed.

c. Importance of issue. The issue is of great importance to virtually every citizen as it involves the right of employment without

having to be deprived of a livelihood because of false statements by persons who either recklessly or deliberately make misrepresentations that deprive an applicant for appointment to a position. The decision of a panel of the Ninth Circuit giving such false statements absolute immunity is an incredibly bad decision that cries for reversal. Many millions of Americans will be interested in the outcome of this appeal for review of the decision.

d. Nature of the hearing. The appointing officials in the case at bar had requested subordinate officers to conduct a non-adversary hearing regarding the qualifications of an applicant for appointment as an officer and to report thereon to the appointing officials. The decision as to whether or not the appointment will be made was not left to the group holding the hearing. The appointing officials reserved the appointing power to themselves. Therefore, there was no decision by the group holding the hearing.

e. The point of law. The panel of the Ninth Circuit decided that defamatory statements are absolutely privileged when made with regard to an applicant for an appointment the same as when judicial proceedings are involved. This is obviously in error, being contrary to all state and federal decisions and having a serious adverse effect upon millions of Americans who will be denied due process of law and rights of privacy by reason of this decision.

SUMMARY OF ARGUMENT

1. The United States Court of Appeals relies for its decision upon the case of Richards v. Konklin, 94 Nev. 86, 575 P.2d 589 (1978). Differing from the case at bar, where the applicant was seeking an initial appointment as an officer of the appointing authority, one Donnell Richards, had already been appointed and was already serving as an officer when some persons wrote letters impugning the competence and professional integrity of Mr. Richards. The Nevada

Supreme Court held that inasmuch as the letters written were preliminary to the filing of a malpractice suit they were therefore part of a judicial proceeding and there was an absolute privilege. The Nevada Supreme Court relied on the case of Romero v. Prince, 85 N.M.474, 513 P 2d 717, 719 (1973) for its ruling. The New Mexico high court had held that the defamation (in the form of a letter) "was written during the course of and as a part of judicial proceedings." (at 720).

The Romero case arose over a dispute pertaining to land, a judgment had been declared but at the "time of the alleged defamation, this judgment had not been paid." (Page 718, Romero Case, supra.)

Thus, in substance, the Ninth Circuit saw no distinction between an actual judicial proceeding and a mere non-adversary inquiry gathering facts for the appointing authority, without even a remote connection to any judicial function.

Furthermore, the record shows that the appellee witness did not even enjoy a qualified immunity as the defamatory matter uttered by him was irrelevant to the hearing and "had no bearing upon the public or private interest which is entitled to protection." (Page 792, Prosser's Law of Torts, 4th Edition.)

The Ninth Circuit panel ignored the fact of irrelevancy as well as the fact that the hearing was non-judicial.

ARGUMENT

I - THE HEARING IN THE CASE AT BAR WAS IN NO SENSE A JUDICIAL OR QUASI-JUDICIAL PROCEEDING.

The late Supreme Court Justice, the Hon. Benjamin N. Cardozo, when he was Chief Justice of the Supreme Court of New York, observed that:

> "A preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right is not a sitting of a court." (People ex rel Karlin v. Culkin, 348 N.Y.465, 162 N.E.487, 60 ALR 851)

The case at bar was clearly not an

adversary hearing nor did it terminate in any decree or establish any rights. It could in no sense be described as either a judicial or quasi-judicial proceeding.

In a similar proceeding, the United States Supreme Court ruled that any appointment such as in the case at bar "is a ministerial act which is performed by virtue of the judicial power such as the appointment of a clerk or bailiff or the specification of the requirements of eligibility or the course of study for applicants for admission to the bar rather than a judicial proceeding." (Re Summers, 325 U.S. 561)(1945).

The Court took jurisdiction in Summers because it found that there was actually a controversy and there were adversary parties.

Particular attention is called to the fact that this case at bar does not involve disciplinary action against a member of the bar. It is conceded that under such circumstances, a witness may well be entitled to an absolute privilege.

The decision of the Ninth Circuit is directly opposite to the decision of the Seventh Circuit in Ktsanes v. Underwood, 560 F 2d 790 (7th Cir.1977) where it was held that where the subject of the hearing is the matter of exemption or waiver of a Supreme Court rule, as in the case at bar, such a hearing is neither a judicial nor a quasi-judicial proceeding and was held to be an administrative proceeding.

In McAfee v. Feller, 452 S.W. 2d 56 (Texas, 1970), it was held that in order for any hearing involving bar admission to have characteristics of a judicial or quasi-judicial proceeding the board holding the hearing must have "authority not only to hear but to decide the matters coming before it, or to redress grievances of which it takes cognizance." It is clear in the case at bar that there was no authority to make any decision with regard to admitting appellant to the practice of law. The Board had only the authority to gather facts and make a report.

The decision of the Ninth Circuit in the case at bar is also in conflict with the decision of the Second Circuit, wherein the Second Circuit reversed the decision of the District Court judge in dismissing a defamation action where absolute privilege was granted to a person who made a written statement that the plaintiff was incompetent, in a report to the F.B.I., who had requested comment from the publisher of the defamation. The Second Circuit decided that the complaint should not have been dismissed because of the absence of "any paramount public need for keeping open sources of information to the F.B.I. to such an extent that all communications to it, however false and malicious, are absolutely privileged." (Foltz v. Moore McCormack Lines, 189 F. 2d 537, 65 Harv.L. Rev. 239).

In the case at bar, as in Foltz, there was no paramount public need on the part of the appellee to make defamatory comment with regard to appellant's competency as a law

professor in regard to a hearing concerning appellant's desire to be appointed as an attorney and officer of the Courts of Nevada.

II - THE MATTER OF EXISTENCE OF MALICE IS A QUESTION FOR THE JURY.

The Ninth Circuit is in conflict with the 4th and 8th Circuits with respect to the question of jury participation in determining the question of malice.

It is clear from the opinion of the panel of the Ninth Circuit in the case at bar (see appendix) that since the word "malice" was not used in the complaint there can be no finding of malice and a finding of malice is necessary to overcome the purported privilege of the witness. This is error.

As indicated in the 4th Circuit case of National Surety Company v. Page, 58 F 2d 145, 59 F 2d 370 (1932) and in the 8th Circuit case of Cole v. Neaf, 334 F 2d 326 (1964) the jury may infer an improper purpose from the lack of probable cause, although the converse inference may not be drawn.

This Honorable Court has itself decided the question: "And the existence of malice is always a question exclusively for the jury." (Stewart v. Sonneborn, 98 U.S. 187, 193, decided in 1878)

Thus, the Ninth Circuit is not only in conflict with at least two other Circuits but is also in conflict with a decision of the Supreme Court.

While the word "malice" is not contained in the Complaint, the jury may find that there was malice even without using the aforementioned word if the evidence is such as to justify such a finding.

> " * * it frequently is said that the privilege is forfeited if the publication is 'malicious.' It is clear that this means something more than the fictitious 'legal malice' which is 'implied' as a disguise for strict liability in any case of unprivileged defamation."
> (Page 794, Prosser "Law of Torts" 4th Ed.)

This Honorable Court has held in the National Surety Case, supra, that malice is for the jury to find. A mere allegation of malice in the Complaint does not compel the jury to

find that malice exists as it is entirely a matter of evidence.

Of course, where there is no privilege involved, as in the case at bar, a finding of malice is not necessary where there is defamatory matter that is libelous or slanderous per se and the defendant cannot prove the truth of his publication. (P. 792 of Prosser, as cited previously.)

III - ANY TESTIMONY WITH REGARD TO ANY FUTURE EMPLOYMENT OR APPOINTMENT OF AN INDIVIDUAL MUST NOT BE IRRELEVANT OR UNCONNECTED WITH THE MATTER AT ISSUE.

The only public interest with respect to the possible appointment of an individual as an officer of the court must be restricted to matters relating to some public or private duty. While a witness may discuss the honesty or character of the candidate for a position or appointment, an attack against the individual's competency as a law professor, not having any bearing on character, would be irrelevant.

As Professor Prosser has so accurately stated:

> "The immunity is forfeited if the defendant steps outside of the scope of the privilege or abuses the occasion." (Page 792 of Prosser. Ibid.)

CONCLUSION

The decision of the Ninth Circuit can do great harm if allowed to remain on the record. It is in conflict with other federal circuits as well as with opinions of the Supreme Court. For these reasons, a writ of certiorari should issue to review the opinion of the Ninth Circuit.

Respectfully submitted,

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Petitioner
In pro se

April 23, 1981

APPENDIX

1 - Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed on November 26, 1980:

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH M. KADANS, Plaintiff-Appellant,	)	
v.	)	LV77-205
LEO J. O'BRIEN, Defendant-Appellee.	)	No.78-2820
	)	MEMORANDUM

Appeal from the United States District Court for the District of Nevada.
Roger Foley, District Judge
Presiding

Submitted 10/27/80

Before: BROWNING, DUNIWAY, and KENNEDY, Circuit Judges.

We construe the order denying leave to amend the complaint, in the circumstances here, as an order dismissing the action and as an appealable order. Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975); Jackson v. Nelson, 405 F. 2d 872, 873 (9th Cir.1968).

The allegedly defamatory statements were absolutely privileged under clear Nevada authority. See, e.g., Richards v. Konklin, 94 Nev. 86, 575 P.2d 589 (1978). The privilege need not be specially pleaded where, as here, its applicability appears on the face of the complaint. See,e.g.,Pavlovsky v. Board of Trade of San Francisco, 171 Cal.App.2d 110, 340 P.2d 63 (1970).

Even if this were deemed a communication about an attorney to a bar association with quasi-

judicial functions, e.g., Katz v. Rosen, 48 Cal.App.3d 1032, 121 Cal.Rptr.853 (1975), the privilege would be either absolute or overcome only upon a showing of malice. Under either theory, the original and the proposed amended complaint were insufficient to state a claim upon which relief could be granted.

AFFIRMED.

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2 - Action on petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH M. KADANS, Appellant, vs. LEO J. O'BRIEN, Appellee.	FILED JAN 29, 1981 NO. 78-2820 ORDER

Appeal from the United States District Court for the District of Nevada

Before: BROWNING, DUNIWAY, and KENNEDY, Circuit Judges.

The petition for rehearing is denied.